and MVPD benefit when carriage is arranged: the station benefits from carriage because its programming and advertising will likely reach more households when carried by MVPDs than otherwise, and the MVPDs benefit because the station's programming adds to the attraction of the MVPD subscription to consumers.[506] Thus, the local television broadcaster and the MVPD negotiate in the context of a roughly even "balance of terror" in which the failure to resolve local broadcast carriage disputes through the retransmission consent process potentially damages each side greatly in their core business endeavor.

181. In addition to this marketplace reality, both MVPDs and broadcasters appear convinced that the rules offer the other significant protections. For example, JCC argue that a cable operator's only potential source of bargaining power in retransmission consent negotiations with a broadcast stations is the ability to decide not to carry the signal of that station, an ability that is restricted by both rule and practical reality, since it is the cable operator that bears the brunt of any public fall-out arising from a failure to reach agreement with a broadcast station, and the broadcast station also has the protection of the must carry provisions.[507] Broadcasters receive additional protections in retransmission consent negotiations, according to JCC, by means of the Network Non-Duplication rule[508] and the Syndicated Exclusivity rule,[509] which they claim make obtaining a substitute for the local broadcast station signal difficult for cable operators because, under Commission rule, stations electing retransmission consent may assert network nonduplication and syndicated exclusivity protection.[510] Applicants, for their part, similarly claim that MVPDs enjoy significant protections in the retransmission consent process under Commission rules. First, they note, a broadcast station may not grant retransmission consent to any MVPD on an exclusive basis.[511] Second, a broadcast station has an affirmative obligation to negotiate in good faith with all MVPDs seeking retransmission consent, and MVPDs are under no reciprocal good faith obligation.[512] Third, Applicants claim that although stations may enter into retransmission consent agreements with different MVPDs containing different terms and conditions, including price terms, such differences must be based on "competitive market conditions and in determining the kinds of agreements that are presumptively not consistent with competitive market consideration, the Commission includes those "the effect of which is to hinder significantly or foreclose MVPD competition."[513] Finally, Applicants observe that an aggrieved MVPD may bring a complaint against a broadcast station based not

[506] *See* Applicants' Reply at 44-45.

[507] JCC Comments at 19 and n.34 (citing 47 U.S.C. 534(b)(9); 47 C.F.R. § 76.1601, Note 1 (2002) (prohibiting deletion or repositioning of a local commercial television station during the four national four-week ratings periods or audience "sweeps"); *In the Matter of Time Warner Cable; Emergency Petition of ABC, Inc. for Declaratory Ruling and Enforcement Order for Violation of Section 76.58 of the Commission's Rules, or in the Alternative for Immediate Injunctive Relief*, 15 FCC Rcd 7882 (2002)).

[508] 47 C.F.R. § 76.92.

[509] 47 C F.R. § 76.101.

[510] JCC Comments at 20 (citing *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, 9 FCC Rcd 6723 at ¶ 114 (1994)).

[511] Applicants' Reply at 45; 47 C F.R. § 76.64(l).

[512] Applicants' Reply at 45; 47 C F R. § 76.65

[513] Applicants' Reply at 45 (citing *Good Faith Negotiations Order*, 15 FCC Rcd at 5470 ¶ 58).

option to walk away from retransmission consent negotiations and broadcast only on DirecTV.[522] EchoStar and others claim that the transaction will enable News Corp. to demand higher retransmission consent fees, withhold access to its local television broadcast signals, or demand concessions such as carriage of affiliated cable networks without fear of failing to secure distribution for any of its programming.[523] Commenters allege that this conduct will harm competition and consumers by forcing DirecTV's competitors to raise consumer rates to pay higher retransmission consent fees and/or by forcing competitors to carry less desirable Fox programming.[524]

185. Several MVPD commenters contend that local television broadcast stations are "must have" programming, which is critical to securing and maintaining subscribers.[525] Commenters also express concern that information sharing between Fox programming divisions and DirecTV will increase News Corp.'s bargaining power in retransmission consent negotiations and thus will adversely affect competing MVPDs.[526] The JCC and EchoStar also contend that News Corp. negotiates or influences the terms of retransmission consent agreements for not only its O&Os, but also for other stations affiliated with the Fox network.[527]

186. JCC note that News Corp. pioneered the use of retransmission consent to spawn new cable programming networks, and that the strategy has allowed News Corp. to expand its cable networks faster than any other cable programmer.[528] Commenters assert that small and medium-sized cable operators are the most vulnerable to News Corp.'s enhanced bargaining power.[529] ACA contends that, although Applicants assert that they only have incentives to consent to carriage on mutually agreeable terms, News Corp.'s historical conduct towards some small and mid-sized cable operators results in agreements that are anything but "mutual" or "agreeable."[530] Instead, ACA claims that negotiations for

[522] EchoStar Petition at 14; Cablevision Comments at 12; JCC Comments at 46.

[523] *See, e.g.,* EchoStar Petition at 12-13; ACA Comments 8-16; Cablevision Comments at 12-16; JCC Comments at 15-33.

[524] JCC Comments at 54-55, Cablevision Comments at 15

[525] EchoStar Petition at 22; Cablevision Comments at 13; JCC Comments, Rogerson Analysis at 9-12. Rogerson states that the closest substitute for a local television broadcast station would be an out-of-market station affiliated with the same network, but notes that such substitution is not possible because of the network non-duplication and syndicated exclusivity rules. *Id.*

[526] EchoStar Petition at 13-18; ACA Comments at 9. As an example, EchoStar notes that because it must obtain retransmission consent from Fox before entering a new local market, DirecTV will know what markets EchoStar plans to enter in advance, and can act strategically to minimize the benefits to EchoStar of entering a new market. EchoStar Petition at 17-18.

[527] JCC Comments at 21, n. 39, 65, EchoStar Petition at 15-16, 18.

[528] JCC Comments at 21, 25-26.

[529] ACA Comments at 8-15; ACA Reply Comments at 4; JCC Comments at 30 ACA claims that smaller cable operators will be especially vulnerable to Fox network abuses because the incentive to disadvantage smaller competitors in favor of DirecTV will likely outweigh any temporary marginal advertising revenue decrease. ACA Comments at 13

[530] ACA Comments at 13-15

is not reflective of today's media marketplace or other media regulations, and note that, today, most popular stations today choose retransmission consent over must-carry.[540] Specifically, JCC assert that retransmission consent was "designed for an era when local broadcast station ownership was less concentrated, when duopolies were prohibited, and broadcast licensees were prohibited from owning a cable system in their local markets," citing several regulatory and marketplace changes since 1992.[541] Cablevision contends that the power imbalance between broadcasters and MVPDs with respect to retransmission consent negotiations has been exacerbated by increased concentration in media ownership and resulting increases in the number of stations affiliated with and controlled by the top four broadcast networks.[542]

189. EchoStar asserts that the Commission's interpretation of the good faith negotiation requirement makes violations difficult to prove, and observes that the Commission has never granted a DBS operator relief under these rules.[543] JCC argue that News Corp. can abuse its market power without its actions qualifying as "outrageous" under the Commission's rules.[544] ACA contends that good faith negotiation complaints are not a viable remedy because: (1) they require extensive resources; and (2) until the complaint is adjudicated, the network signal must be dropped.[545] Commenters further note that the Commission's rules regulating broadcasters' retransmission negotiations are scheduled to sunset at the end of 2005.[546]

190. Cablevision also expresses particular concern about the effect of the transaction on its DBS affiliate, Rainbow DBS.[547] Cablevision claims that Rainbow DBS has the potential to become a formidable DBS competitor, so DirecTV has a strong incentive to hobble Rainbow DBS' development.[548] Cablevision contends that vertical integration with a supplier of programming and television broadcast signals will give DirecTV the ability to disadvantage its DBS competition.[549] Cablevision asserts that the Applicants' argument that News Corp. cannot risk losing viewers is wholly inapplicable to Rainbow DBS

[540] JCC Comments at 17-18. CFA agrees and has urged Congress to "revisit the necessity of retransmission consent at is pertains to stations owned and operated by News Corp./Fox" in testimony before the Senate Commerce Committee. CFA Reply at 12.

[541] JCC Comments at 17-18.

[542] Cablevision at 11; *see also* JCC Comments at 28 n.61(discussing News Corp.'s ability to use its television duopolies and RSNs to cross-promote the outlets, bundle sales of advertising time, and gain leverage in retransmission consent negotiations).

[543] EchoStar Petition at 19. EchoStar contends that the good faith requirement, as interpreted by the Commission, applies to the process of negotiations, not the substantive terms. *Id.*

[544] JCC Comments at 31 (citing 47 C.F.R. §§ 76.65(c), 76.7).

[545] ACA Comments at 11-12

[546] ACA Comments at 11-12; JCC Comments at 34; JCC Aug. 4 Ex Parte, Rogerson Analysis II at 39.

[547] Cablevision Comments at 19-20.

[548] Cablevision Comments at 19.

[549] Cablevision Comments at 19-20.

and risks to News Corp. of employing "take it or leave it" bargaining tactics with competing MVPDs seeking to carry "must have" FOX broadcast network programming, thus increasing the likelihood that News Corp. will engage in such behavior.[560] JCC contend that the increase in bargaining power resulting from the transaction will lead to higher prices for consumers, particularly in less dense regions of the country served by small to medium-sized cable systems.[561] JCC and Cablevision further contend that News Corp. need only withhold – or threaten to withhold – programming from a handful of MVPDs in a few select markets for only a short period of time in order to obtain undue pricing power and negotiating leverage.[562]

195. Commenters assert that documents filed in the record by Applicants demonstrate that: (1) News Corp. already engages in temporary foreclosure of local broadcast station programming to obtain more favorable rates and terms; (2) acquiring control over DirecTV will reduce the costs of such tactics; and (3) News Corp. recognizes that service interruptions can send a valuable message to other MVPDs about the consequences of resisting its demands.[563]

196. JCC and Cablevision also use the data and methodology from the CRA's permanent foreclosure analysis to support their temporary foreclosure theory.[564] For example, Rogerson, on behalf of the JCC, finds that, if News Corp. temporarily withholds a broadcast station from a targeted MVPD, it breaks even economically if less than 1% of that MVPD's subscribers migrate to DirecTV.[565] In a similar vein, Cablevision's Rubinfeld concludes that temporary withholding of broadcast programming will be profitable if DirecTV's market share increases by just less than 1.5%.[566] JCC further argues that, since the ultimate purpose of temporary withholding of programming is to increase prices across a national base of over ninety million MVPD households, it is clear that News Corp. has every incentive to engage in such conduct.[567] JCC asserts that in the context of temporary foreclosure, DirecTV's national footprint is especially important, because it insulates Applicants against any potential losses from such

[560] JCC Aug. 4 Ex Parte at 2; Cablevision Ex Parte at 1.

[561] JCC Aug 4 Ex Parte at 2, Rogerson Analysis II at 2

[562] Rogerson states that "In large part, the studies of News Corp.'s economists are focused upon demonstrating that it is not economically rational for News Corp. to withhold programming permanently from rival MVPDs to increase DirecTV's attractiveness and market share Lexecon and CRA ignore and do not account for the more likely scenario—that News Corp., armed with increased bargaining power, has increased ability to raise prices to all distributors, and therefore to consumers, through the actual or threatened withholding of programming." JCC Aug. 4 Ex Parte, Rogerson Analysis II at 2. *See also* Rubinfeld at 1, 10

[563] JCC Nov. 5 Ex Parte at 2-3; Cablevision Aug. 20 Ex Parte at 2. In support of this, JCC cite documents **[REDACTED]**. JCC also cites News Corp. documents **[REDACTED]**. Similarly, Cablevision asserts **[REDACTED]** Cablevision Aug. 20 Ex Parte at 2 **[REDACTED]** Applicants disagree with JCC's interpretation of their documents *See* Letter from William M. Wiltshire, Harris, Wiltshire & Grannis, LLP, Gary M. Epstein, Latham & Watkins, and Richard E Wiley, Wiley Rein & Fielding, to Marlene H. Dortch, Secretary, FCC (Nov. 13, 2003) ("Applicants' Nov. 13 Ex Parte").

[564] JCC Aug 4 Ex Parte at 3 and Rogerson Analysis II; Cablevision Aug. 20 Ex Parte at 1 and Rubinfeld Analysis.

[565] JCC Aug. 4 Ex Parte, Rogerson Analysis II at 2-3.

[566] Cablevision Aug 20 Ex Parte at 2 and Rubinfeld Analysis at 10.

[567] JCC Aug. 4 Ex Parte, Rogerson Analysis II at 3.

subscribers would remain with DirecTV; and (3) underestimate or disregard potential countermeasures available to MVPDs and the potential degradation in the value of programming withheld. Applicants assert that by accounting for these factors, their analysis correctly finds that temporary foreclosure would not be profitable.[576]

### (iii) Discussion

201. We find that News Corp. currently possesses significant market power in the DMAs in which it has the ability to negotiate retransmission consent agreements on behalf of local broadcast television stations.[577] Local broadcast station programming is highly valued by consumers, and entry into the broadcast station market is difficult. Moreover, we conclude that, absent conditions, News Corp.'s acquisition of DirecTV will enhance this market power, which could result in several public interest harms. To prevent such harms, we will impose conditions that are discussed below.

202. At the outset, we agree with commenters who contend that carriage of local television broadcast station signals is critical to MVPD offerings. Congress has repeatedly recognized the importance of carriage of local television broadcast signals to MVPDs—most recently when it enacted the SHVIA, which permitted DBS operators to carry local television broadcast signals so that they could better compete with cable operators.[578] As we recently found in our annual video competition report, DBS penetration has increased more rapidly in markets where local-into-local service is available.[579] We also agree with commenters who contend that News Corp. possesses market power in the broadcast station segment of the video programming market. We base this finding, in part, on the fact that the signals of local television broadcast stations are without close substitutes. Moreover, because of the extremely limited availability of new television broadcast licenses, entry into this segment of the video programming market is highly restricted.

203. We further find that News Corp.'s existing control of MVPDs' access to a large number of local broadcast stations airing highly popular Fox network programming, when combined with ownership of a nationwide DBS platform, will likely increase News Corp.'s incentive and ability engage in temporary foreclosure strategies aimed at increasing its programming fees thereby having the effect of raising rival MVPDs' costs by lowering the costs to News Corp. of engaging in such behavior. Both Applicants and commenters have provided economic analyses that rely, in part, on empirical data to evaluate whether News Corp., after the transaction, will engage in some form of foreclosure.[580]

[576] Applicants' Sept. 8 Ex Parte at 2.

[577] Our conclusions apply to any O&O station as well as any local broadcast station affiliate on whose behalf News Corp. negotiates retransmission consent agreements.

[578] *See* H.R. Rep. No. 106-79 at 11-15 (1999); Satellite Home Viewer Improvement Act, Pub.L. No. 106-113, 113 Stat.1501, at App. I at 1501A-523 & 544

[579] DBS operators report that the ability to carry local television broadcast signals has made their service more attractive to consumers. *See 2002 Video Competition Report*, 17 FCC Rcd 26901, 26931-32 ¶ 61 (2002); *see also* U.S Government Accounting Office (GAO) Report to the Subcommittee on Antitrust, Competition, and Business and Consumer Rights, Committee on the Judiciary, U.S. Senate, *Telecommunications Issues in Providing Cable and Satellite Television Services*, GAO-03-130, October 2002 at i, 9-12.

[580] *See* Applicants' Reply, CRA Analysis; JCC Comments, Rogerson Analysis; JCC Aug. 4, 2003 Ex Parte, Rogerson Analysis II; JCC Aug. 4, 2003 Ex Parte, *Economic Analysis of the Competitive Effects of the Takeover of*
(continued....)

206. *Temporary Foreclosure:* The case of temporary foreclosure is slightly more complicated than that for permanent foreclosure. In particular, the analysis of temporary foreclosure required staff to consider additional variables, including the likelihood that some customers would later return to their initial MVPD service,[586] the timing of the foreclosure, and the timing of subscriber gain and loss.[587] We again agree with commenters who argue that a temporary foreclosure strategy is likely to be profitable for News Corp. in many instances, and therefore likely to be pursued more frequently post-transaction than it is today The staff analysis found that, for News Corp. to profit from a temporary foreclosure strategy in which a Fox broadcast signal is withheld for one month, DirecTV would have to capture between **[REDACTED]** and **[REDACTED]** of rival MVPD's subscribers, depending on the size of the market and whether News Corp. could capture 50% or 100% of the additional profits.[588] We find that the subscriber shifts required for temporary foreclosure to be profitable are likely to be realized.

207. We base this finding on the effects of the temporary withdrawal of the ABC broadcast station from Time Warner subscribers in the Houston DMA. As commenters have noted, this example illustrates the likely responses of consumers to the anticipation and eventual loss of a popular broadcast station from their chosen MVPD.[589] The Applicants argue that this incident is not relevant since the withdrawal of the broadcast station was instigated by the MVPD rather than the broadcaster, as would occur under the harms alleged in this proceeding.[590] Our use of this incident is not intended to analyze the motives behind the withdrawal, however. Rather, we use the incident to measure the likely responses of consumers to the loss of broadcast programming.

208. Both Cablevision and the Applicants have provided data on the subscriber shift that occurred during the ABC – Time Warner dispute. Cablevision reports that 20,000 vouchers were issued for free installation of DirecTV to Time Warner customers in Houston, or about 3% of Time Warner's subscribers in Houston.[591] Cablevision does not have any information on the number of rebates that were actually redeemed for DirecTV service.[592] However, the Applicants provided an accounting of the number of rebate coupons redeemed in the Houston area of approximately **[REDACTED]**.[593] The

[586] Our analysis assumes that no customers will leave DirecTV for the first 12 months following their switch, **[REDACTED]** will leave once their equipment contracts expire, and in all following months, **[REDACTED]** of the remaining customers will revert to their original MVPD. *See* Appendix D, Technical Appendix.

[587] We adopt a discounted cash flow approach to allow us to compare the benefits and costs of that occur over time. The discounted cash flow analysis is the technique used by both commenters and Applicants and is the standard method for comparing flows of costs and benefits that vary temporally. *See* Applicants' Sept. 8 Ex Parte; Cablevision Aug. 20 Ex Parte, Rubinfield Analysis.

[588] *See* Appendix D, Technical Appendix.

[589] JCC Sept. 23 Ex Parte at 18; Cablevision August 19 Ex Parte at 3-5

[590] Applicants' Sept 8 Ex Parte at 25-27.

[591] Cablevision Aug. 19 Ex Parte at 4.

[592] Furthermore, we note that Time Warner offered to accept the rebate coupons and issue credits for digital cable and Internet service. *See* Mike McDaniel, *TV Spat Turns into Game of Give and Let-Give, Cable Firms to Honor Ch 13 Satellite Vouchers*, HOUSTON CHRONICLE, Mar 8, 2000

[593] Applicants' Response to Second Information and Document Request at 3; Applicants' Response to Third Information and Document Request at 3-4.

signals harms consumers who cannot access desired Fox programming, local news and public affairs programming, and other programming available on the affected stations, even if the loss is temporary.

211. We disagree with Applicants' contention that, even if the transaction affected their incentive to engage in such a strategy, our rules would prevent them from executing such a strategy successfully.[598] Although the Act and our rules are important safeguards by requiring good faith negotiation with MVPDs and prohibiting exclusive retransmission consent agreements, these statutory and rule provisions do not prevent broadcasters from withholding their signals while retransmission consent negotiations are in progress, nor do they require that access be provided on non-discriminatory terms and conditions.[599] And, the rules will not prevent News Corp. from uniformly raising broadcast programming carriage costs to all MVPDs, including DirecTV. Because we find that the proposed transaction poses likely consumer harms that will not be adequately mitigated by the Commission's existing rules, and the Applicants have offered no additional access commitments, we consider below whether other conditions can mitigate this harm

**(iv) Conditions**

212. *Positions of the Parties* Consumers Union and JCC urge the Commission to expand the proposed program access commitments proposed by Applicants to include the television broadcast programming of Fox O&Os and any other Fox affiliates for which News Corp. conducts retransmission consent negotiations.[600] Consumers Union explains that extension of News Corp.'s non-discrimination condition to local broadcast station programming can be useful in preventing egregious competitive abuses such as selling Fox programming to DirecTV's competitors at prices that are substantially and unjustifiably higher than the price paid by DirecTV.[601] Non-discrimination requirements alone, however, will not stop News Corp. from charging DirecTV an artificially high price for Fox programming and then requiring any MVPDs seeking to carry the programming to either pay a rate based upon that same high rate or allow DirecTV to become the major distributor of that programming in the MVPD's market, according to Consumers Union. Therefore, Consumers Union recommends that the Commission impose a restriction similar to what the FTC applied in the Time Warner/Turner merger. In that instance, Consumers Union avers, the FTC established a cable programming price index mechanism to evaluate whether the merging companies were raising programming prices at a more accelerated pace than their historic pattern.[602]

(Continued from previous page)
24 ¶¶ 7-8, 13627 ¶ 17, 13643-44, ¶¶ 73-76 ("*2002 Biennial Review Order*"), *recon. pending*; *Rules and Regulations Relating to Multiple Ownership*, 18 F.C.C. 288 (1953).

[598] Applicants' Reply at 44-46

[599] We also disagree with the contention that the alleged harm of the transaction could occur through contracting. **[REDACTED]**

[600] JCC Comments at 64-65, Consumers Union Sept. 23 Ex Parte at 5.

[601] Consumers Union Sept. 23 Ex Parte at 5.

[602] Consumers Union Sept. 23 Ex Parte at 5-6 (citing Agreement Containing Consent Order, In the Matter of Time Warner Inc., Turner Broadcasting System Inc., Tele-Communications, Inc., and Liberty Media Corporation, File No. 961-004, Before the Federal Trade Commission (Sept. 12, 1996) at http //www.ftc.gov/os/1996/09/timewar.pdf).

negotiate carriage of its broadcast stations in certain circumstances.[611] As described in Section VI.C.4.b *supra*, JCC propose that we institute a commercial arbitration remedy for aggrieved MVPDs to use when retransmission consent negotiations reach an impasse.[612] The arbitration mechanism, according to JCC, is designed constrain the undue pricing power and bargaining leverage News Corp. gains by its ability to profit from subscriber shifts to DirecTV during periods of temporary foreclosure, and thereby mitigate News Corp.'s ability to utilize DirecTV as a "tactical weapon" during retransmission consent negotiations with unaffiliated MVPDs.[613] JCC also recommends that we prohibit News Corp. from removing its broadcast station signal from the aggrieved MVPD's system during the pendency of an arbitration proceeding. RCN supports this aspect of JCC's proposal.[614] JCC also urge us to mandate that News Corp. grant MVPDs nondiscriminatory access to any nationwide high-definition ("HDTV") feed of Fox network programming that News Corp. may implement in the future.[615] EchoStar urges us to: (i) apply the good faith negotiation rules proposed by DirecTV in the good faith negotiation proceeding to News Corp.;[616] and (ii) require that retransmission consent fees for Fox O&Os do not exceed the lower of the highest fees agreed to with any other network station in the same market *or* the fees agreed to for Fox affiliates in other markets.[617]

215. *Discussion.* Several conditions proposed by commenters are intended to remedy situations that are unrelated to the transaction. As we stated earlier, we decline to impose non-transaction specific conditions. The goal of our transfer application review process is to allow parties to realize the economic efficiencies associated with a transaction while ensuring that any harms resulting from the license transfer are mitigated and some portion of the benefits of the transfer are passed on to the public. For example, the ACA and Cablevision request that DirecTV be required to make its local-into-local broadcast station signals available to cable operators when the cable operator cannot receive a good quality broadcast signal off-air.[618] We do not have any evidence that the transaction will reduce the quality of broadcast signals available to cable operators and we therefore decline the condition as being unrelated to the transaction.

216. We also reject the proposed conditions that are calculated to remedy harms that we have determined are unlikely to occur. EchoStar worries that the sharing of information about requests for retransmission request between News Corp.'s owned and operated television stations and DirecTV will allow DirecTV to engage in strategic actions that will reduce EchoStar's incentives to introduce local-

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[611] JCC Aug. 18 Ex Parte., Attachment at 7-8

[612] JCC Aug. 18 Ex Parte, Attachment at 7-8.

[613] JCC Aug. 18 Ex Parte at 2

[614] RCN Oct. 24 Ex Parte, Attachment at 7.

[615] JCC Comments at 65-66.

[616] *See Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, CS Docket No. 99-363, DirecTV Comments (filed Jan. 12, 2000). *See also Good Faith Negotiation Order.*

[617] EchoStar Petition at 67; *see also* JCC Reply Comments at 15-16.

[618] ACA Oct. 17 Ex Parte at 11-12.

mechanism is intended to limit News Corp.'s post-transaction incentive and ability to threaten or impose broadcast service interruptions on subscribers of competing MVPDs to extract greater price increases than it obtain under today's conditions.

221. Upon receiving notice of the intention to submit the dispute to arbitration, pursuant to the procedures described in the following paragraph, News Corp. must immediately allow continued retransmission of the broadcast station signal under the same terms and conditions of the expired contract, unless the dispute is a first time request for local broadcast station signal carriage by an MVPD. The staff analysis clearly demonstrates that, even in the absence of the supracompetitive rates, News Corp 's threats of temporary foreclosure can generate significant gains in nearly all markets. Consumer reactions in this area are such that the additional profits DirecTV would earn from subscribers switching MVPDs will likely compensate News Corp. relatively rapidly for the lost revenue from reduced distribution of the broadcast signal.

222. We establish the following procedures for arbitration of retransmission consent disputes:

*Commercial Arbitration Remedy*

- The commercial arbitration condition commences following the expiration of any existing retransmission consent agreement.
- Following such expiration, or 90 days after a first time request for retransmission consent, an MVPD may notify News Corp. within five business days that it intends to request arbitration over the terms and conditions of retransmission consent.
- Upon receiving timely notice of the MVPD's intent to arbitrate, News Corp. must immediately allow continued retransmission of the broadcast signal under the same terms and conditions of the expired retransmission consent agreement as long as the MVPD continues to meet the obligations set forth in this condition.
- Retransmission of the broadcast signal during the period of arbitration is not required in the case of first time requests for carriage.
- *"Cooling Off Period."* Following the MVPD's notice of intent to submit the dispute to arbitration, but prior to filing for formal arbitration with the American Arbitration Association ("AAA"), the MVPD and News Corp. will enter a "cooling off" period during which negotiations will continue.
- *Formal Filing with the AAA.* The MVPD's formal demand for arbitration, which shall include the MVPD's "final offer," may be filed with the AAA no earlier than the fifteenth business day after the expiration of the retransmission consent agreement and no later than the end of the twentieth business day following such expiration. If the MVPD makes a timely demand, News Corp. must participate in the arbitration proceeding.
- The AAA will notify News Corp. and the MVPD upon receiving the MVPD's formal filing.
- News Corp. will file a "final offer" with the AAA within two business days of being notified by the AAA that a formal demand for arbitration has been filed by the MVPD.
- The MVPD's final offer may not be disclosed until the AAA has received the final offer from News Corp.
- The final offers shall be in the form of a contract for the retransmission of the broadcast signal for a period of three years. The final offers may not include any provision to carry any video programming networks or any other service other than the broadcast signal.

- Judgment upon an award entered by the arbitrator may be entered by any court having competent jurisdiction over the matter, unless one party indicates that it wishes to seek review of the award with the Commission, and does so in a timely manner.

*Review of Award by the Commission*

- A party aggrieved by the arbitrator's award may file with the Commission a petition seeking *de novo* review of the award. The petition must be filed within 30 days of the date the award is published.
- The MVPD may elect to continue to retransmit the broadcast signal pending the FCC decision, subject to the terms and conditions of the arbitrator's award.
- In reviewing the award, the Commission will examine the same evidence that was presented to the Arbitrator and will choose the final offer of the party that most closely approximates the fair market value of the programming carriage rights at issue.
- The Commission may award the winning party costs and expenses (including reasonable attorney fees), to be paid by the losing party, if it considers the appeal or conduct by the losing party to have been unreasonable. Such an award of costs and expenses may cover both the appeal and the costs and expenses (including reasonable attorney fees) of the arbitration.[625]

223. An MVPD meeting the Commission's definition of "small cable company" may appoint a bargaining agent to bargain collectively on its behalf in negotiating with News Corp. for carriage of the programming subject to this condition and News Corp. may not refuse to negotiate with such an entity.[626] The designated collective bargaining entity will have all the rights and responsibilities granted by these conditions.

224. The costs of arbitration may overwhelm MVPDs with fewer than 5000 subscribers, thereby providing them with little relief from the harms associated with this transaction. Accordingly, as suggested by ACA, when dealing with MVPDs with fewer than 5,000 total subscribers, we require News Corp. to either elect "must-carry" status or negotiate retransmission consent for its owned and operated stations without any requirements for cash compensation or carriage of programming other than the broadcast signal. While we are unwilling to apply such a condition to all MVPDs since it would seriously disadvantage News Corp. relative to other producers of video programming that also own broadcast stations, we find the adverse consequences on News Corp. to be minimal. In the latest retransmission consent cycle, News Corp. granted retransmission consent to approximately 71% of the cable operators serving markets in which it owns and operates broadcast stations without seeking compensation of any kind.[627]

225. No later than 20 business days prior to the expiration of a must-carry election or retransmission consent agreement with an MVPD, News Corp. must provide the MVPD with a copy of the conditions imposed in this Order News Corp. must provide a copy of the conditions imposed in this Order within 10 business days of receiving a first time request for retransmission consent.

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[625] The Commission has the authority to award attorney fees and costs. *See* 47 C.F.R. § 1.6009(b)(3).

[626] The Commission has previously defined small cable companies as those with 400,000 or fewer subscribers. We adopt that definition for the purposes of this condition. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 10 FCC Rcd 7393 (1995).

[627] Applicants' Reply at 46

to use the Gemstar EPG to the exclusion of alternative, preferred products.[635] Cablevision contends that News Corp. could use its increased leverage in retransmission consent negotiations with Cablevision and Rainbow DBS to force them to carry the Gemstar EPG.[636] Cablevision also contends that News Corp., through DirecTV, is guaranteed access to an MVPD platform even if cable operators do not agree to use the Gemstar EPG as a condition for access to the Fox O&O broadcast stations.[637] JCC argue that News Corp., in a carriage dispute, could use the EPG "to exploit subscriber dislocation and resentment associated with dropped channels, through heightened promotion of DirecTV or by placing text messages and click-through DirecTV marketing materials on the EPG channel slot normally associated with the dropped service."[638] JCC note the DOJ's position that EPGs/IPGs are a relevant antitrust product market and contend that EPGs are a necessary component of cable operator product offerings.[639] They claim that cable operators that have committed to upgrade their systems would not regard incompatible EPGs as viable substitutes and are thus "locked in" to agreements with Gemstar.[640] JCC and ACA claim that News Corp. could use its control of Gemstar to disadvantage DirecTV's rivals by raising the costs of the Gemstar EPG or otherwise discriminating against cable operators, including small cable operators, in the content, unique features, or license terms and conditions offered to these competitors.[641] The JCC argue that the proposed transaction "threatens to give new impetus to anti-competitive leveraging of Gemstar/TV Guide's dominance in the EPG marketplace."[642]

230. News Corp. contends that any competitive concerns regarding its 42.9% control of Gemstar are unwarranted because DirecTV has only a small share of the MVPD market and that, "in practice, Gemstar has not been the default EPG for the DTH systems in which News Corp. holds an interest – for example, BSkyB uses a different EPG product."[643] News Corp.'s argument is premised on the Commission's decision regarding the lack of potential harm from an EPG/MVPD affiliation in the *AT&T-MediaOne* transaction, where AT&T's acquisition of Media One was found to pose no threat to competition in the EPG marketplace.[644] In *AT&T-MediaOne,* the Commission identified three potential harms from an EPG/MVPD affiliation: (1) the MVPD could steer subscribers toward affiliated content providers; (2) the MVPD could harm unaffiliated EPG providers by selecting affiliated EPGs for its system; and (3) the MVPD could lock EPG providers into exclusive contracts that would prevent them

[635] Cablevision Comments at 20-22, CDD Petition at 3-4; EchoStar Petition at 24-25; JCC Comments at 48-49; NAB Comments at 20; NRTC Petition at 14-15, ACA Reply at 9; JCC Reply at 8-9.

[636] Cablevision Comments at 21

[637] Cablevision Comments at 3

[638] JCC Comments at 48

[639] *Id* at 49 n.120 (citing *U S v Gemstar and TV Guide*, CV No. 1:03CV00198, (D.D.C., filed Feb. 6, 2003)).

[640] *Id.* at 49.

[641] JCC Comments at 49; ACA Reply at 9

[642] JCC Aug 4 Ex Parte at 14-15.

[643] Application at 66-67.

[644] *Id* at 65-67 (citing *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Grop, Inc., Transferor, to AT&T Corp., Transferee*, 15 FCC Rcd 9816, 9856-58 (2000) ("*AT&T-MediaOne*")).

interval of each Fox O&O broadcast station.[654] CDD also contends that Gemstar's licensing arrangements with MSOs under which it shares a portion of the interactive platform advertising revenue that it generates through the MSO raises questions about the integration of News Corp. business operations with the cable industry, its primary competitor.[655]

233. In response, News Corp. points out that the Commission concluded in *AT&T-MediaOne* that concerns relating to the EPG marketplace are more appropriately addressed in a general, industry wide, rulemaking and thus the Commission has made clear that an individual transfer application would not be the proper forum in which to address EPG-specific issues.[656] News Corp. claims that the Commission's decision in *AT&T-MediaOne* established the general proposition that an MVPD with less than 30% of MVPD subscribers would not have the ability to use a commonly-owned EPG to disadvantage other MVPDs, other programmers, or other EPG providers and thus the transaction will have no such adverse consequences.[657] News Corp. finds that virtually all of the concerns raised by the parties are irrelevant to this proceeding because they are wholly speculative and in no way arise from the instant transaction.[658] News Corp. argues that its interest in the EPG technology platform already exists, and is not altered in any way by the proposed transaction, and it states that it could attempt to use retransmission consent rights today to promote the use of the Gemstar EPG over cable and satellite MVPDs, if such a strategy made economic sense.[659]

234. *Discussion* We find that many of the harms alleged are unrelated to this transaction. The alleged harms arising from joint control of video programming assets and program guides can occur regardless of this transaction. Under our general rulemaking authority, we have committed to "monitor developments with respect to the availability of electronic programming guides to determine whether any action is appropriate in the future."[660] To the extent that evidence accrues that demonstrates the necessity of Commission action regarding the availability of EPGs, we will consider it at that time.[661]

235. An alleged harm that is specific to this transaction involves News Corp.'s purported ability to disadvantage its MVPD rivals through either permanent or temporary foreclosure of electronic and interactive program guides during contract negotiations and using threats of these actions to extract

[654] CDD Petition at 4

[655] *Id*

[656] *Id* at 50-51.

[657] *Id.* at 52.

[658] *Id* at 51.

[659] *Id.*

[660] *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, 13 FCC Rcd 14775, 14820 ¶ 116 (1998). We are also exploring EPG-related issues in other pending rulemaking proceedings *See Compatibility Between Cable Systems and Consumer Electronics Equipment*, 15 FCC Rcd 17568 (2000); *Nondiscrimination in the Distribution of Interactive Television Services Over Cable*, 16 FCC Rcd 1321 (2001); *Carriage of Digital Television Broadcast Signals*, 16 FCC Rcd 2598 (2001).

[661] We have also sought comment on the development and deployment of EPGs and the technologies used to provide them to consumers. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 18 FCC Rcd 16042, 16049 (2003).

[REDACTED]. We also note that the current competitors in the market, as well as the most likely entrants, are firms that manufacture set-top boxes.[667] These are firms with existing relationships with MVPDs and provide one of the necessary inputs -- set-top boxes -- that are required in order for the subscriber to use an IPG. Attempts by News Corp. to raise prices for TV Guide Interactive are likely to be countered by MVPDs switching to alternative suppliers with whom they have existing relationships. [REDACTED].[668] Thus, we do not find that the proposed transaction will likely produce consumer or competitive harms related to access to interactive program guides.

240. Our conditions for RSN and retransmission consent negotiations should alleviate the concerns raised by the commenters regarding News Corp.'s ability to use a tying strategy to leverage RSNs or retransmission consent rights to increase the use or price of the Gemstar EPG.[669] As we indicated above, given the nature of the IPG market, at present any such benefit from tying must come from News Corp's market power as a source of other "essential programming." Because the conditions we impose are intended to neutralize any additional market power created by the proposed transaction in these areas, News Corp. should not be able to successfully tie the purchase of the Gemstar products to its RSN or local broadcast programming in order to garner more market power in the EPG/IPG markets than Gemstar currently holds, as a result of the proposed transaction.

241. Some parties have alleged that News Corp., through patent litigation initiated by Gemstar-TV Guide, has the opportunity to monopolize the IPG market. This in and of itself is not a merger specific issue. Moreover we observe that such claims are already an area of substantial litigation. [REDACTED][670] -- we find that this issue does not warrant specific attention in this license transfer review proceeding. The Commission will, however, continue to monitor the situation.

#### (ii) Interactive Television

242. *Background.* The Commission has yet to define interactive television ("ITV") or classify ITV for regulatory purposes under the Communications Act, but has broadly characterized ITV as a service or suite of services that support subscriber-initiated choices or actions that are related to one or more video programming streams.[671] Services providing such capabilities may include video-on-demand, personal video recorder, gaming, e-mail, TV-based e-commerce ("t-commerce"), interactive advertising,

[667] Pioneer and Scientific Atlanta accounted for nearly 43% of digital set-top boxes shipped in 2001 according to *Kagan Media Trends 2003*.

[668] [REDACTED].

[669] *See* Section VI.C.4 b and c, *supra*, and Section IX, *infra*.

[670] [REDACTED]

[671] *See Nondiscrimination in the Distribution of Interactive Television Services Over Cable*, 16 FCC Rcd 1321, 1323 (2001) ("*ITV NOI*") In the *ITV NOI*, the Commission noted that ITV was rapidly developing, thus making it difficult to define with specificity the precise universe of services that might be encompassed within the term. For purposes of discussion, the *ITV NOI* instead attempted to identify the major technical resources or "building blocks" necessary for the provision of what it understood to be likely ITV services. *Id.*, 16 FCC Rcd at 1329. The identified components were: (1) a video transmission capacity associated with interactive content (*e.g.*, the digital video stream), (2) a two-way connection (*e.g.*, via the Internet), and (3) specialized customer premises equipment (*e.g.*, the interactive television set-top box). *Id.*, 16 FCC Rcd at 1324-25.

argues that the relationship between News Corp. and Liberty Media, which controls Open TV and Wink, and has a stake in ACTV and significant cable programming interests, will impact the emerging ITV marketplace by disadvantaging competing program suppliers and technology companies.[679]

244. In response, the Applicants argue that they do not have sufficient market power in any relevant product or geographic market to profitably engage in anti-competitive foreclosure.[680] They further contend that the harms proffered by the parties are speculative and are not transaction-specific and therefore do not provide a basis either for denying their Application or for imposing regulatory conditions.[681] The Applicants also state that News Corp. has no ownership interest in and no agreements pending to acquire an interest in Liberty Media.[682] The Applicants further state that "DirecTV will not enter into exclusive arrangements for satellite cable programming with 'affiliated program rights holders' including Liberty, and will not 'unduly or improperly influence the decision' of such rights holders to sell satellite cable programming to other MVPDs, or the prices, terms and conditions of such sale."[683]

245 *Discussion.* In other proceedings, the Commission has found that the interactive television market in the U.S. is nascent and "to date commercial two-way interactive service deployments have been very limited."[684] In our *2002 Video Competition Report*, we reported that "[c]able MSOs and DBS operators continue to develop these services as measures to increase subscribership, develop new streams of revenue, and reduce churn."[685] The Report also indicated that the multiple but incompatible platforms in use today have slowed the development of ITV content and applications.[686] Accordingly, we agree with the Applicants that DirecTV's share of the MVPD market is too small to enable the merged entity to exercise market power in any ITV market. Until this market develops further, the vertical harms alleged by NAB and CDD are speculative at best.[687] We therefore find that this transaction would not

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[679] *See* CDD Petition at 4, CDD Nov. 3 Ex Parte at 1-2; CDD Nov. 17 Ex Parte at 3-4. CDD refers to Liberty's present and potential future investment in News Corp (citing SEC 10Q filing, 5/14/03). OpenTV provides interactive television technology and content for the cable, satellite and terrestrial broadband industries. *See* OpenTV Homepage at http://www.opentv.com (visited Sept 11, 2003). Wink is a free interactive television service, distributed through partnership agreements with cable and satellite operators, broadcasters, advertisers, and equipment manufacturers, that provides viewers with the ability to access enhanced programs or advertisements via the remote control while continuing to watch television. *See* Wink Homepage at http://www wink.com (visited Sept. 11, 2003). On July 1, 2003, ACTV was acquired by OpenTV. *See OpenTV Completes the Acquisition of ACTV* (press release), Jul. 1, 2003.

[680] Applicants' Reply at 12-23.

[681] *Id.* at 50-51.

[682] News Corp. July 28 Response at 25.

[683] Applicants' Nov. 14 Ex Parte at 4 (citing Application at 61-63).

[684] *2002 Video Competition Report,* 17 FCC Rcd at 26972 ¶ 170

[685] *2002 Video Competition Report,* 17 FCC Rcd at 26972.

[686] *Id*

[687] We note that NAB raised similar concerns regarding a cable operator's ability to dominate the ITV market in the *ITV NOI* proceeding. As we reported in the *2002 Video Competition Report*, we have seen no evidence of such domination in the current marketplace.

regulatory conditions.[693] They also argue that Sun's requested condition falls outside the scope of this proceeding because it "would conflict with the Commission's well-established policy against picking winners and losers among competing technologies and its preference to let the market decide such issues."[694]

249. *Discussion* As the Applicants note, our preference is to allow the market to determine which technologies succeed and which fail. We see no reason on the record before us to presume that the set-top box market will fail to deploy the technologies that best serve consumers, and therefore decline to impose the condition proposed by Sun Microsystems.

250. With respect to conditional access systems, we find that NDS does not possess sufficient market power in the United States to profitably discriminate against competing MVPDs. Set-top box manufacturers Scientific-Atlanta and Motorola are the dominant providers of conditional access systems to domestic MVPDs.[695] Accordingly, any attempt by NDS to disadvantage DirecTV's rivals would almost certainly be unavailing. We do not impose license conditions to mitigate hypothetical harms.

e. **Access to Fixed Satellite Services**

251. *Background.* A portion of the Application before us involves the transfer of control of the licenses of PanAmSat from Hughes to News Corp.[696] PanAmSat is a significant provider of fixed satellite services ("FSS")[697] in the United States and currently is 81% owned by Hughes.[698] Most distribution of video programming to MVPD service providers (and to over-the-air television broadcasters) is carried over FSS. Upon closing of the proposed transaction, News Corp. would be, in addition to its broadcast television and cable network holdings, both an MVPD and an FSS provider.

252. MVPDs typically retransmit programming received from distant points, rather than originate programming at the locale where transmission takes place. To obtain these signals, MVPDs rely primarily on FSS provided over a number of geo-stationary orbit ("GSO") satellites.[699] For national

[693] Applicants' Reply at 50-51; Applicants' Nov. 14 Ex Parte at 2-3.

[694] News Corp. Aug. 28 Ex Parte at 5 (citing *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24014 (1998); *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd 11331, 11376 (2002))

[695] *Kagan Media Trends 2003* at 110 and NE Asia Online, *Sony Pushes New Conditional Access Technology*, May 2003 at http.//neasia.nikkeibp.com/nea/200305/cojp_244652.html (visited Oct. 2, 2003).

[696] *See* Application, Volume I, A for a list of all satellite space station authorizations controlled by Hughes; *see also* Application, Volume I, B for a chart depicting a simplified ownership structure of GM/Hughes' pre-transaction FCC licenses; *see also* Application, Volume I, D for a chart depicting a simplified ownership structure of Hughes' post-transaction FCC licenses.

[697] FSS is defined as satellite service between fixed, as opposed to mobile, points, and excludes broadcast satellite service such as DBS

[698] *See* Application, Volume I, B.

[699] Non-geostationary FSS also exist, but because of cost and other considerations, video distribution is carried primarily by GSO satellites operating in the C- and Ku-bands. In the rest of this Order, when we refer to FSS satellites, we mean GSO FSS satellites exclusively.

market position was such that "any anti-competitive schemes were 'unlikely to occur and even more unlikely to succeed.'"[710]

256. *Discussion.* Although Hughes controls a significant share of the FSS capacity through its ownership of the PanAmSat satellites, News Corp. does not operate any FSS satellites. Thus, upon consummation of the proposed transaction, News Corp. would control the identical percentage to that controlled currently by Hughes. It is therefore evident that the proposed transaction does not increase concentration in the FSS capacity. In addition, as we have previously noted,[711] PanAmSat is already under common control with a DBS provider – DirecTV – and the proposed transaction would not change that situation. No opponent or commenter has made a credible showing as to why News Corp.'s ownership of PanAmSat, as compared to Hughes,' would adversely impact competition in the provision of FSS, in the video programming markets, or any other relevant satellite service or market.

257. As we have discussed, there are situations in which it would be profitable for an integrated firm to pursue a vertical foreclosure strategy against downstream rivals that use the firm's goods or services.[712] Thus, it is possible that News Corp, once it has acquired PanAmSat, might have an incentive to use its market power in the provision of FSS capacity (assuming, arguendo, that it would have such power) to competitively harm video programming rivals who use FSS. For instance, News Corp. could degrade the quality of the FSS service provided to rivals, restrict supply, or raise the price of FSS, all in attempt to gain additional share (and earn additional profits) in the video programming market.

258. We find that such attempts are unlikely to occur and even more unlikely to succeed. First, with PanAmSat's share of the FSS capacity, it remains doubtful that News Corp. would have sufficient market power to carry out such a scheme. Second, there appears to be sufficient excess capacity in the FSS market so that if News Corp./PanAmSat attempted to raise the rates it charges to its video programming rivals, or degrade the service it provides to them, it likely would lose these customers to other FSS providers. Thus, unilateral restriction of FSS supply would likely be very costly to News Corp. and would likely achieve very little in the marketplace. Market power in an upstream market is a necessary condition for competitive harms to occur in a vertical merger. We find no change in the competitive landscape that would cause us to alter our prior conclusion that PanAmSat possesses limited market power in the provision of FSS capacity. We therefore conclude that News Corp.'s acquisition of PanAmSat will be unlikely to cause competitive harm in the provision of FSS or in the video programming markets.

[710] *See* Applicants' Reply at 53 (citing *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20659).

[711] *See EchoStar-DirecTV HDO*, 17 FCC Rcd at 20660

[712] *See* Section VI C.1, *supra*.

# VII. OTHER POTENTIAL PUBLIC INTEREST HARMS

## A. Impact of the Transaction on Diversity

### 1. Background

259. As stated above, the Commission's public interest review includes an evaluation of the proposed transaction's affect on the quality and diversity of communications services to consumers.[713] Commenters have raised issues concerning the proposed transaction's impact on program and viewpoint diversity. Commenters contend that the transaction will adversely affect both program diversity and viewpoint diversity, either as a direct result of the combination of an MVPD, programmer, and broadcaster, or as a result of competitive harms posed by the transaction. Applicants counter that the transaction presents no potential harms to viewpoint diversity[714] and will increase programming geared to linguistic, ethnic, and cultural minorities.[715] Commenters disagree, claiming that the Applicants have not shown that any transaction-specific benefits relating to diversity will result from the proposed transaction.[716] Below, we analyze the diversity issues raised by commenters. We conclude that potential harms to viewpoint and program diversity will be addressed by the conditions we are imposing on our approval of the Application.

### 2. Program Diversity

260. *Positions of the Parties.* One of the Commission's goals is to promote program diversity, which refers to the availability of a variety of programming formats such as comedy, drama, and newsmagazines, as well as specific content categories such as health, business, food and content targeted to ethnic or racial groups.[717] EchoStar asserts that the transaction will have anticompetitive effects on the market for video programming which also will harm diversity. EchoStar states that the transaction would foreclose what is currently the largest unaffiliated distribution network, and that vertical integration would reduce or eliminate DirecTV's incentives to offer programming that competes with News Corp. offerings.[718] EchoStar contends that harm to competition in the video programming market could result in fewer viable independent programmers, and therefore less diversity.[719] Cablevision asserts that by combining content, broadcasting, and an MVPD platform, the transaction will give News Corp. substantial leverage and market power that will result in fewer programming choices for cable subscribers and reduced local broadcast programming.[720] Cablevision repeats its claim that vertical

[713] *See* Section III, *supra*; *see also EchoStar-DirecTV HDO*, 17 FCC Rcd at 20759-85 ¶¶ 37-52 (analyzing the impact of the proposed transaction on viewpoint and program diversity).

[714] Applicants' Reply at 65-67

[715] Application at 39-43; Applicants' Sept. 11 Ex Parte at 3-4.

[716] ACA Comments at 28; JCC Comments at 72

[717] *2002 Biennial Review Order*, 18 FCC Rcd at 13631-32 ¶ 36

[718] EchoStar Petition at 39-40; *see also* NRTC Petition at 14; CFA Reply Comments at 9-12.

[719] EchoStar Petition at 39-40, *see also* CFA Reply Comments at 9-12 (asserting that "the diversity of program sources has eroded to the point of extinction")

[720] Cablevision Comments at 23-24

distribution of video programming within the United States, a full CONUS satellite "footprint" is needed.[700] A significant portion of the capacity on FSS satellites in the United States is dedicated to video distribution.[701]

253. There are three major FSS operators licensed by the United States: SES AMERICOM, PanAmSat, and Loral Space.[702] Other providers include New Skies, Anik, and various Latin American satellites partly available for North American use. PanAmSat owns and operates a fleet of 22 satellites that operate in FSS bands, and with that capacity carries video programming for broadcasters and other programmers, as well as Internet backbone support, communications network support and pipelines for telecommunications providers.[703] SES AMERICOM and its subsidiaries provide similar services through a fleet of 18 satellites.[704]

254. Applicants state that News Corp., as one of the world's largest users of satellite video services, will be able to offer valuable customer insight to PanAmSat.[705] And, because PanAmSat derives more than 65% of its revenues from carrying video services, Applicants claim that News Corp's insight "should prove an invaluable tool in devising strategies for developing new markets and new services around the world."[706] Applicants argue, therefore, that the proposed transaction will create synergies throughout Hughes.[707] Further, Applicants argue that PanAmSat's new ownership structure will neither increase FSS concentration, nor raise any prospect of competitive harm in the MVPD marketplace.[708]

255. NRTC, however, argues that once News Corp. acquires an interest in PanAmSat, it could manipulate the prices paid by broadcasters, cable programmers, and others who rely on PanAmSat for video distribution backhaul, thereby raising costs for competitors and ultimately, their customers.[709] Applicants responded by stating that PanAmSat's current market position is essentially the same as it was in October 2002 when the Commission released its *EchoStar-DirecTV HDO* and found that PanAmSat's

[700] The footprint of a satellite at a CONUS location will include the 48 contiguous states.

[701] *See* ING Barings' *Satellite Communications Industry*, March 2000 at 149.

[702] *See* SPACE NEWS, Jun. 23, 2003, at 18.

[703] Application at 6.

[704] *See* Comments of SES AMERICOM, Inc., In the Matter of Loral Satellite, Inc. (Debtor in Possession) and Loral SpaceCom Corporation (Debtor-in-Possession), Assignors, and Intelsat North America LLC, Assignee, Applications for Consent to Assignments of Space Station Authorizations, September 15, 2003, at 2.

[705] *See* Application at 44.

[706] *Id*

[707] *Id*

[708] *Id*. at 67.

[709] NRTC Petition at 14.

create any public interest harm in this particular line of business. We will, however, continue to monitor the development of interactive television technologies and services.[688]

246. With respect to CDD's allegation regarding Liberty, we are not convinced that Liberty's unreciprocated financial interest in News Corp. will induce DirecTV to ignore its customers and the profits they generate, and instead provide programming that its customers may not want. Our analyses of the vertical issues in this transaction hinge on the assumption that News Corp. and DirecTV will act to maximize their profits. CDD's allegation assumes that DirecTV will act in a contrary manner, which we find implausible. Liberty Media and News Corp. do not share any members of their Boards of Directors.[689] While it is true that Liberty owns a substantial share of News Corp. stock, this stock carries only limited voting rights that do not include a vote on the nominees for the Board of Directors. A formal mechanism does not exist, beyond arm's length market transactions, by which Liberty Media can influence the programming choices of DirecTV.

### (iii) Conditional Access Technology and Set-top Boxes.

247. *Positions of the Parties.* Cablevision, CDD, and EchoStar argue that News Corp.'s control of DirecTV and NDS would give it the incentive and ability to discriminate against MVPD competitors in its provisioning of conditional access technology and interactive applications.[690] Sun Microsystems alleges no particular transaction-specific harm but requests that the Commission require or "at a minimum encourage" DirecTV to migrate to Multimedia Home Platform ("MHP") based set-top box standards, which will allow for interoperability with CableLabs' Open Cable Application Platform ("OCAP") and ATSC's Digital Application Software Environment ("DASE").[691] CDD contends that the Application should be denied or at least conditioned on Applicants providing non-discriminatory access to all related distribution technologies and devices, including conditional access and interactive marketing software/processing.[692]

248. The Applicants respond that the harms alleged by the respective commenters are speculative and, therefore, do not provide a basis for either denying their Application or for imposing

[688] The Commission recently issued the *2003 Video Competition Notice* in which we sought comment on the development and deployment of ITV services and the technologies used to provide them. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 18 FCC Rcd 16042, 16049 (2003) ("*2003 Video Competition Notice*").

[689] Application, Attachments - Volume I at C-3 and Liberty Media Corp., *Notice of Annual Meeting of Shareholders*, at http://www.libertymedia.com/investor_relations/pdfs/annualmeeting_2003.pdf (visited Oct. 2, 2003).

[690] Cablevision Comments at 22, CDD Petition at 4; EchoStar Petition at 38, 60; CDD Nov. 3 Ex Parte at 1-2; CDD Nov. 17 Ex Parte at 2.

[691] Sun July 30 Ex Parte at 1-2. MHP is an open standard created in Europe establishing a common framework for content, application, and service delivery over different transmission systems. It is based on DVB-J, which relies on Sun Microsystem's Java Virtual Machine specification. *See DVB-MHP - What is MHP?* at http://www.mhp.org/what_is_mhp/index.html (visited Nov. 18, 2003).

[692] See Letter from Jeffrey Chester, Center for Digital Democracy, to Marlene H. Dortch, Secretary, FCC (Nov. 7, 2003) at 3 ("CDD Nov. 7 Ex Parte")

interactive program guides, Internet access, and program-related enhanced content.[672] Although not requiring a return path, service offerings such as electronic program guides, might also fit within the ITV category. A number of companies are involved in developing the technical standards, equipment and software necessary to provide ITV services.[673] In connection with its review of the American Online ("AOL") – Time Warner merger, the Commission issued a Notice of Inquiry to consider whether industry-wide rules were needed to address any impediments to the development of ITV services and markets, particularly with respect to cable-delivered ITV services.[674] In *AOL-Time Warner*, the Commission concluded that the newly formed company had the incentive and potential ability to use its combined control of cable system facilities, video programming, and the AOLTV interactive service, to discriminate against unaffiliated video programming networks in the provision of ITV services.[675] The Commission held, however, that the terms of the Federal Trade Commission's AOL-Time Warner Consent Agreement regarding ITV would substantially address concerns about the availability of alternatives for the distribution of unaffiliated video programming networks' ITV services.[676] Although the Commission concluded that no further merger-related restrictions pertaining to ITV were warranted, it did find that open questions regarding distribution of ITV services warranted further examination in the aforementioned proceeding of general-applicability. The *ITV NOI* remains pending.

243. *Positions of the Parties* NAB and CDD argue that the proposed transaction would result in a single entity with control over both content and distribution and therefore allow News Corp. to act as a "gatekeeper" with the ability and the incentive to discriminate against unaffiliated providers of content and services, including providers of ITV and other emerging communications services.[677] NAB contends that discrimination could take "many forms" such as the denial of access to the DBS platform or in "such technology related areas as interactivity, channel assignment and positioning, use of navigation devices and electronic program guides, data transfer speed, and downstream and return path traffic."[678] CDD

[672] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd 26901, 26971 (2002) ("*2002 Video Competition Report*").

[673] Major ITV middleware and content providers include Liberty's OpenTV, ACTV, and Wink; Liberate, Worldgate; and GoldPocket Interactive. *See 2002 Video Competition Report*, 17 FCC Rcd at 26972. News Corp.-controlled NDS recently announced its acquisition of Thomson's *MEDIA*HIGHWAY, another ITV middleware provider. *See NDS Acquires Thomson's MEDIAHIGHWAY and Enters into Strategic Alliance with Thomson on Provision of Middleware* (press release), Sept. 13, 2003. NDS has also entered into an agreement with itaas, Inc. to provide "support services to NDS for the development of interactive applications for Scientific-Atlanta's Explorer set-top boxes." *See NDS Selects itaas Program to Support Development of Advanced Interactive TV Applications*, (press release), July 28, 2003.

[674] *See ITV NOI*.

[675] *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorization by Time Warner, Inc. and America Online, Inc. to AOL Time Warner, Inc*, 16 FCC Rcd 6547 (2001) ("*AOL-Time Warner*").

[676] *Id.* at 6646. The FTC ordered AOL-Time Warner not to discriminate in the transmission and carriage of interactive content and forbade AOL-Time Warner from blocking or otherwise interfering with interactive content transmitted by an unaffiliated ISP. The FTC Consent Agreement also prohibited AOL-Time Warner from blocking subscribers' access to any interactive content that is carried on the AOL-Time Warner facilities and thus enabled subscribers to access such content as part of an ITV service provided by an unaffiliated entity. *Id.*

[677] NAB Comments at 20; CDD Nov. 3 Ex Parte at 1-2.

[678] *Id*

additional concessions. We analyze, in turn, the likelihood of News Corp. engaging in such a strategy for each of the three program guide products sold by its subsidiary, Gemstar-TV Guide: the TV Guide Channel, EPG Jr., and TV Guide Interactive.

236. The program guide feature of the TV Guide Channel consists of a scrolling list of programming organized by the channels carried by the cable system. The TV Guide Channel is available to approximately 50 million MVPD subscribers. We find that while this product possesses a large market share, News Corp. will be unable to use its acquisition of control of DirecTV to extend its dominance in the EPG market because of the relative ease by which competing video programming producers could enter the market or MVPDs could choose to self-supply. In addition, the substitutes available to both consumers and MVPDs should limit the shift of subscribers from rival MVPDs to DirecTV should News Corp. attempt to engage in foreclosure. We do not find high barriers to entry to this market given the common technology used to implement an on-screen display of programming information as well as the existence of an independent supplier of consolidated program listings data.[662] This should eliminate any increased incentives arising from the transaction for News Corp. to engage in permanent foreclosure. In the event of attempted temporary foreclosure, the substitutes available to consumers, which include newspapers, magazines, and the Internet, are more than adequate to carry them through any temporary withdrawal of the EPG and therefore limit the numbers that might switch to DirecTV.

237. With respect to the EPG Jr. product, a text-only program guide, we find that News Corp. does not possess the necessary market power to engage in the harms alleged by the opponents to this transaction. **[REDACTED]**.[663]

238. The TV Guide Interactive product is an on-screen listing of television program information with interactive functions that enable viewers to navigate, sort, select and schedule television programming for viewing using a remote control.[664] Post-transaction, News Corp. will acquire an interest in the DirecTV-produced IPG. Under some situations, this might raise concerns that the acquisition will enhance News Corp.-controlled Gemstar's ability to affect the price of IPGs. However, DirecTV is not currently selling its IPG to other MVPDs.[665] Although the transaction will result in an increase in concentration in the IPG market, because DirecTV, like the other large MSOs, does not resell its IPG product, it is doubtful that this structural change will cause a change in the behavior of market participants. We therefore do not find that control of DirecTV's IPG product would enhance News Corp.'s ability to restrict the supply of IPGs and thereby influence price.

239. Our concern regarding potential vertical harms attributable to the share of the IPG market controlled by News Corp. is mitigated by several factors. First, we note that **[REDACTED]**.[666]

662 Tribune Media Services provides listings of program information to competing EPG/IPGs, as well as newspapers, magazines, and other media. In addition, we note that since the original information on programming is supplied by programmers themselves, an MVPD could collect this data on its own.

663 **[REDACTED]**.

664 *See* Gemstar-TV Guide, TV Guide Interactive, at http://www.gemstartvguide.com/whatwedo/ipgproducts.asp (visited Nov. 6, 2003).

665 In addition, **[REDACTED]**.

666 **[REDACTED]**

from dealing with other MVPDs.[645] The Commission found that the requirement that AT&T reduce its attributable cable system ownership interests was sufficient to circumscribe AT&T's alleged ability to harm unaffiliated content providers, unaffiliated EPGs, and other MVPDs because AT&T, post-divestiture, would serve a smaller share of the MVPD market.[646] Although AT&T held a comparable interest to News Corp. in TV Guide (a corporate predecessor of Gemstar), News Corp. argues that there is no basis for concern here because DirecTV has a much smaller share of the MVPD market than that allowed in the *AT&T-MediaOne* transaction.[647]

231. NRTC, however, contends that the potential for vertical foreclosure and discrimination in favor of News Corp.'s EPG is greater here than in the case of *AT&T-MediaOne* because cable was subject to a 30% ownership (coverage) cap while full-CONUS DBS operators such as DirecTV have 100% nationwide coverage and no market share cap.[648] In addition, CDD argues that given Gemstar's penetration to approximately 100 million people in the United States, the importance in controlling the EPG cannot be understated and it urges the Commission to examine all the proprietary technologies and intellectual property relationships involving Gemstar to determine the impact that this News Corp.-controlled entity will have on a wide number of markets, including consumer electronics, VCR-plus, and set-top boxes.[649] According to Cablevision and EchoStar, Gemstar has aggressively asserted its patent rights in litigation against competing EPG providers and users of EPGs, taking a broad view that its patents encompass the use of EPGs, including the interactive grid guide.[650] EchoStar argues that Gemstar, should it prevail on its patent claims, would exert monopoly power over all EPG providers, including EchoStar.[651] EchoStar also argues that News Corp., with an assured distribution outlet in DirecTV, would be unfettered to extract unreasonable fees or other terms and conditions relating to its programming assets by leveraging its market power in the EPG realm.[652] EchoStar and the JCC request that the Commission clarify that program access rules would extend to EPGs and "[p]rohibit the tying of any non-programming intellectual property rights to the carriage of programming."[653]

232. CDD also states that Fox stations have been given a preferred position on the IPG in their designated market areas and that Gemstar has the right to transmit IPG data in the vertical blanking

[645] *AT&T-MediaOne*, 15 FCC Rcd at 9857 ¶ 89.

[646] *AT&T-MediaOne*, 15 FCC Rcd at 9857-58 ¶ 90.

[647] Application at 66. *See also* Applicants' Nov. 14 Ex Parte at 2.

[648] NRTC Petition at 14-15

[649] CDD Petition at 3-4.

[650] Cablevision Comments at 21; EchoStar Petition at 24.

[651] EchoStar Petition at 25. On June 19, 2003, the U.S District Court in Atlanta granted EchoStar's motion for summary judgment against Gemstar concerning issues involving a patent for electronic program guide technology. EchoStar filed suit against Gemstar in December 2000, accusing the company of violating federal and state antitrust laws. Gemstar counterclaimed, accusing EchoStar of infringing on two patents. Gemstar is expected to reinstate it patent claims and seek a new court decision sometime in 2004. *See* SkyReport, Jun. 20, 2003, *DISH Wins Patent Case Vs. Gemstar*, at http://www skyreport.com/viewskyreport.cfm?ReleaseID=1148.

[652] EchoStar Petition at 25.

[653] EchoStar Petition at 61, 65-66; JCC Reply at 8-9

226. As we observed above, the markets and technologies used in the provision of MVPD services and video programming continue to evolve over time, rendering accurate predictions of future competitive conditions difficult. Accordingly, the conditions concerning carriage of programming subject to retransmission consent shall cease to be effective six years after the release of this *Order*.[628] The Commission will consider a petition for modification of this condition if it can be demonstrated that there has been a material change in circumstance or the conditions have proven unduly burdensome, rendering the condition no longer necessary in the public interest.

d. **Access to Programming-Related Technologies**

(i) **Electronic Program Guides/Interactive Program Guides**

227. *Background.* In this section we examine the proposed transaction's potential impact on the use of electronic program guides ("EPGs") and interactive program guides ("IPGs"). An EPG is a software-based service or device offered by cable operators and other MVPDs to consumers to navigate, organize, and differentiate video program offerings.[629] An IPG is an EPG that allows for consumer interactivity. For example, a consumer with an IPG is able to sort and select programming, schedule reminders for upcoming programming, obtain additional information or descriptions about the programming or advertised products, as well as purchase pay-per-view and video-on-demand programming using their remote control.[630]

228. News Corp. holds a 42.9% interest in Gemstar – TV Guide International, Inc. ("Gemstar"), the leading provider of EPGs and IPGs.[631] Gemstar currently offers three guide products to MVPDs: TV Guide Channel (an EPG), EPG, Jr. (a text-only guide), and TV Guide Interactive (an IPG).[632] News Corp. also states that its subsidiary, NDS, has entered into a patent agreement with Gemstar and begun to offer an IPG in the United States, although the IPG is not yet operational.[633] The NDS IPG is offered only in conjunction with NDS conditional access technology and not on a stand-alone basis.[634]

229. *Positions of the Parties.* Several parties contend that the proposed transaction will increase News Corp.'s incentive to tie Gemstar's EPG to retransmission consent negotiations with unaffiliated MVPDs and that News Corp.'s enhanced bargaining power could force these other MVPDs

[628] The six-year period is intended to cover the next two retransmission consent negotiation cycles.

[629] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd 26901 (2002).

[630] The majority of the comments focused on EPGs.

[631] Application at 65.

[632] Gemstar July 31 Response at 7

[633] News Corp. July 28 Response at 27-29 According to News Corp., "[t]o date, NDS has entered into agreements to provide its IPG product to only two MVPDs: (1) a single RCN system in the Chicago area; and (2) the DBS system planned by a Cablevision subsidiary, R/L DBS." *Id* at 27.

[634] *Id* at 27. News Corp also states that NDS has "received no revenue in exchange for distribution of its IPG product" and that the IPG will not carry advertising. *Id.* at 28.

*Rules of Arbitration*

- The arbitration will be decided by a single arbitrator under the expedited procedures of the Rules, excluding the rules relating to large, complex cases, but including the modifications to the Rules set forth in the Order.
- The parties may agree to modify any of the time limits set forth above and any of the procedural rules of the arbitration; absent agreement, however, the rules specified herein apply. The parties may not, however, modify the requirement that they engage in final-offer arbitration.
- The arbitrator is directed to choose the "final offer" of the party which most closely approximates the fair market value of the programming carriage rights at issue.
- To determine fair market value, the arbitrator may consider any relevant evidence (and may require the parties to submit such evidence to the extent it is in their possession),[622] including, but not limited to:
  - current contracts between MVPDs and Fox-affiliated stations on whose behalf News Corp. does not negotiate;
  - current contracts between MVPDs and non-Fox network stations;
  - offers made in the preceding negotiations (which may provide evidence of either a floor or a ceiling of fair market value);
  - evidence of the relative value of Fox programming compared to other network programming (e.g., advertising rates, ratings);
  - contracts between MVPDs and stations on whose behalf News Corp. has negotiated made before News Corp. acquired control of DirecTV as well as offers made in such negotiations;[623]
  - internal studies of the imputed value of retransmission consent agreements in bundled agreements;[624]
  - changes in the value of non-Fox retransmission consent agreements;
  - changes in the value or costs of Fox programming or broadcast stations, or in other prices relevant to the relative value of Fox broadcast programming (e.g., advertising rates).

- The arbitrator may not consider offers prior to the arbitration made by the MVPD and News Corp. for the programming at issue in determining the fair market value.
- If the arbitrator finds that one party's conduct, during the course of the arbitration, has been unreasonable, the arbitrator may assess all or a portion of the other parties costs and expenses (including attorney fees) against the offending party.
- Following the decision of the arbitrator, and to the extent practicable, the terms of the new retransmission consent agreement, including payment terms, if any, will become retroactive to the expiration date of the previous retransmission consent agreement. The MVPD will make an additional payment to News Corp. in an amount representing the difference, if any, between the amount that is required to be paid under the arbitrator's award and the amount actually paid under the terms of the expired contract during the period of arbitration.

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[622] We clarify that, by "possession," we mean actual possession or control.

[623] **[REDACTED]**.

[624] **[REDACTED]**.

into-local service in additional markets.[619] We find this harm unlikely to occur. Evidence in the record indicates that **[REDACTED]**.[620]

217. Many of the proposed conditions attempt to remedy the harms we have identified, but in our opinion either fail to remedy the harms or place the Applicants at a disadvantage relative to their positions prior to the transaction. For example, Cablevisions' proposal to require the waiver of retransmission consent for News Corp.'s owned and operated stations only in areas served by Cablevision fails to fully address the harms. Our analysis demonstrates that consumers in nearly all areas of the country are likely to be harmed by the transaction. In addition, applying Cablevision's condition to all of News Corp.'s owned and operated stations would put News Corp. at a distinct disadvantage in obtaining carriage of its cable networks relative to other broadcast station owners with affiliated cable programming networks such as Viacom and Disney.

218. *Conditions* We impose several conditions on News Corp that combine the most attractive aspects of several proposals in the record. At the outset, in terms of stations covered by our remedy, we realize that today News Corp. does not negotiate retransmission consent agreements on behalf of independently owned network affiliates.[621] However, our analysis indicates that the harms we believe will occur in markets served by News Corp.'s owned and operated stations could also occur in markets served by broadcast stations affiliated with the Fox network. Since these stations do not possess an ownership interest in DirecTV, we are not concerned about a substantial change in leverage in retransmission consent negotiations except in situations where News Corp. is able to intervene in the negotiations. Accordingly, we extend our conditions to apply whenever News Corp. negotiates retransmission consent agreements on behalf of independently owned Fox network affiliates.

219. We will extend the commitments News Corp. has proposed regarding non-discriminatory access to cable programming networks to encompass access to any broadcast station that News Corp. owns and operates, or on whose behalf it negotiates retransmission consent. This will, as Consumers Union has noted, prevent News Corp. from engaging in competitive abuses such as selling Fox broadcast programming to DirecTV's competitors at prices that are substantially and unjustifiably higher than the price paid by DirecTV. Congress prohibited non-discrimination for satellite programming to ensure this programming was available to competing MVPDs. We believe that a similar prohibition toward News Corp.'s broadcast stations will counter its market power and make certain that this critical programming is available to MVPDs. In addition, the good faith and exclusivity requirements of SHVIA, which, by their terms, are effective only until January 1, 2006, are extended to apply to News Corp. for as long as our program access rules are in effect. This should help to temper increases in News Corp.'s market power arising from the transaction and protect the public interest in continued access to local broadcast stations carried by their MVPD as part of their package of video programming services.

220. Our primary condition to alleviate the public interest harms in the market for broadcast station retransmission consent is to allow MVPDs with 5,000 or more subscribers to elect to submit a dispute with News Corp. over the terms and conditions of carriage of programming subject to retransmission consent to commercial arbitration. We choose this remedy to provide a fair and neutral mechanism by which disputants can quickly resolve retransmission consent disputes. The arbitration

[619] EchoStar Petition at 17-18

[620] **[REDACTED]**.

[621] Applicants' Response to Third Information and Document Request at 1-3.

213. ACA suggests another variant on the benchmarking proposal articulated by Consumers Union. Under ACA's proposal, News Corp. also could not impose terms or conditions on other cable operators that are "more costly or burdensome" than the terms and conditions of current retransmission consent agreements.[603] Disputes could be brought to the Commission, and News Corp. would be required to grant the aggrieved cable operator retransmission consent pending resolution of the dispute.[604] ACA's plan would require News Corp. to negotiate retransmission consent with smaller cable operators on a group basis, consistent with News Corp's current practices for satellite programming. ACA explains that its proposals would maintain News Corp.'s and smaller cable operators' ability to negotiate a wide variety of mutually beneficial carriage arrangements that may include some compensation for News Corp., or conversely, for the cable operator, while preventing News Corp. from raising the "price" of retransmission consent to DirecTV's competitors as a consequence of gaining control of DirecTV. Permitting smaller cable operators to pool their resources and address retransmission consent on a group basis, as they have done for years on the satellite programming side, will also temper the increase in negotiating leverage News Corp. gains from the transaction.[605] ACA also proposes that News Corp. be required to grant retransmission consent to small cable operators (i.e., those serving 5,000 subscribers or less) for no additional consideration beyond continued carriage and channel placement.[606] ACA states that this condition would merely adopt what the Applicants say is News Corp.'s current practice – that News Corp. has granted retransmission consent to approximately 320 small cable companies "without seeking compensation of any kind, with cash or carriage."[607] Finally, ACA requests that the Applicants be required to offer distribution rights to qualifying cable operators for the local-into-local broadcast signals carried by DirecTV.[608] Cablevision urges the Commission to impose a similar requirement allowing Rainbow DBS to redistribute local signals carried by DirecTV.[609] But, in the main, Cablevision is doubtful that behavioral remedies alone will adequately mitigate the increase in News Corp.'s market power arising from the transaction, and maintains that a structural approach is better. Cablevision therefore contends that, if the Application is granted, News Corp. should be required to waive the retransmission consent rights of all of its O&Os and to elect must-carry on all Cablevision systems.[610]

214. JCC also urges us to prohibit News Corp. from entering into any exclusive retransmission consent contracts or other exclusive distribution agreements for its O&Os and any other broadcast stations on which it negotiates agreements, make its broadcast stations available to all MVPDs on a non-discriminatory basis, and to require News Corp. to enter into arbitration proceedings to

[603] ACA Oct. 17 Ex Parte at Exhibit A, Page 1.

[604] *Id*

[605] ACA Oct. 17 Ex Parte at 6.

[606] ACA Oct. 17 Ex Parte at Exhibit A, Page 1

[607] ACA Oct. 17 Ex Parte at 6.

[608] ACA Oct. 17 Ex Parte at Exhibit A, Page 2.

[609] Cablevision Comments at 32. Cablevision also urges the Commission to prohibit Applicants from excluding Rainbow DBS from any agreement to share backhaul it makes with EchoStar "in the course of this merger." Cablevision has not demonstrated that any such agreement has been reached, or that negotiations concerning backhaul are in progress.

[610] Cablevision Comments at 27.

number of rebate coupons available was limited, however, and there may have been many other Time Warner customers that switched to DirecTV without receiving a rebate.[594] We conclude, therefore, that this estimate represents merely a lower bound on the number of Time Warner customers that switched to DirecTV. Cablevision, using data on the number of DirecTV subscribers in the Houston DMA during the time of the dispute, estimates that DirecTV **[REDACTED]** customers due to the withdrawal of the ABC signal from the Time Warner cable systems in Houston.[595] The staff's econometric analysis of DirecTV's gains in subscribers indicates that DirecTV gained **[REDACTED]** customers, or **[REDACTED]** of Time Warner's customers in Houston, as a result of the dispute.[596] We find this response to be representative of the shifts of customers that could occur during a long-simmering dispute over retransmission consent. According to our analysis, a shift of this magnitude would put **[REDACTED]** at risk of the harms alleged to result from this transaction.

209. Based on this analysis, we conclude that the transaction will increase News Corp.'s post-transaction incentive and ability to temporarily withhold access to the signals of its television broadcast stations as a negotiating tactic by lowering the risks and costs to News Corp. of engaging in such foreclosure. We agree with commenter claims that this enhanced incentive and ability to engage in temporary foreclosure will allow News Corp. to extract more compensation for its broadcast station signals from competing MVPDs than it could reasonably expect to achieve absent the transaction. The potential public interest harms that would result from such a strategy are substantial. News Corp.'s ability to raise rivals' costs in this manner would harm consumers in different ways depending on the type of compensation it obtains. When News Corp. secures carriage of other cable programming networks from MVPDs in exchange for its broadcast signal, MVPDs pay for those networks. If News Corp. can secure carriage of more cable networks and charge higher fees for such carriage, these fees are unlikely to be absorbed solely by the MVPDs, but would be passed on to consumers in the form of higher rates. If News Corp. uses withholding or threats of withholding in retransmission consent negotiations to obtain carriage of its affiliated cable networks that the MVPD, absent the threat of foreclosure, would not agree to carry, consumers are harmed because MVPDs are forced to make programming decisions based on News Corp.'s demands, rather than selecting the programming of their choice. In the long term, News Corp 's use of market power to extract artificially high levels of compensation from MVPD rivals, or other carriage concessions, could make rival MVPDs less viable options for consumers, thus limiting consumer choice.

210. Moreover, during periods of temporary foreclosure, News Corp.'s television broadcast signal is not available to the subscribers of competing MVPDs. We have previously found that local broadcast station signals play a very important role in terms of viewpoint diversity and localism, two of our most important Communications Act goals and policies.[597] Loss of access to local broadcast stations

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[594] Mike McDaniel, *TV Spat Turns into Game of Give and Let-Give, Cable Firms to Honor Ch. 13 Satellite Vouchers*, HOUSTON CHRONICLE, Mar. 8, 2000.

[595] Letter from Tara Corvo , Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, PC, to Marlene H. Dortch, Secretary, FCC (Nov 20, 2003) ("Cablevision Nov. 20 Ex Parte"), Daniel L. Rubinfeld and Duncan Cameron, Estimating the Effect on MVPD Subscribership of the May 2000 Withholding of ABC Network Retransmissions from Time Warner Houston Cable Subscribers at 11.

[596] *See* Appendix D, Technical Appendix at para. 23

[597] *See, e g , 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620, 13623-
(continued… )

Applicants' analyses find that they would not profit from either permanent or temporary foreclosure.[581] Commenters' analyses, in contrast, find that Applicants will have an increased incentive and ability to temporarily withhold access to their broadcast signals.[582]

204. In addition to the studies submitted by the parties, Commission staff conducted its own analysis, which is described in greater detail in Appendix D. As commenters have correctly observed, the *ability* of a television broadcast station to threaten to withhold its signal, even if it does not actually do so, changes its bargaining position with respect to MVPDs, and could allow it to extract higher prices, which ultimately are passed on to consumers.[583] Staff's analysis is, as was true for RSN carriage, premised on the assumption that, if the transaction increases News Corp.'s incentive and ability to withhold the signals of its O&Os by lowering the costs to News Corp. of employing such bargaining tactics, News Corp. will engage in such behavior and that this will result in an increase of rival MVPDs' costs, and ultimately end-user prices. Key to determining the degree to which the transaction lowers News Corp.'s costs of engaging in temporary foreclosure is the number of subscribers that can be predicted to shift from the affected MVPD to competitor DirecTV to access the foreclosed programming, which in turn will increase the profits of the post-transaction company as a whole. Staff analyzed the likelihood of two types of potential post-transaction foreclosure of access to News Corp.'s broadcast signals: (1) permanent foreclosure, where the signal is permanently removed from rival MVPDs; and (2) temporary foreclosure, where the signal is removed for a brief period. Staff performed this analysis for all markets in which Fox owns the broadcasts station or has an affiliation agreement with the station.[584]

205. *Permanent Foreclosure*· As discussed in greater detail in Appendix D, staff's analysis examined the potential profitability of both permanent and temporary foreclosure strategies each of News Corp.'s O&O broadcast stations. Based upon staff's analysis, we find that, for News Corp. to profit from a permanent foreclosure strategy, DirecTV would have to capture between **[REDACTED]** and **[REDACTED]** of rival MVPD's subscribers, depending on whether News Corp. captures 50% or 100% of the additional profits, and the size of the market.[585] We agree with Applicants that it is unlikely that DirecTV would experience subscriber gains of these magnitudes as a result of a broadcast programming foreclosure strategy. Consequently, we do not believe that use of a permanent foreclosure strategy in retransmission consent negotiations is a likely harm arising from this transaction.

(Continued from previous page)

*DirecTV by News Corp.*, William P. Rogerson ("Rogerson Analysis III"); Cablevision Aug. 20 Ex Parte, Rubinfeld Analysis; Cablevision Sept 25 Ex Parte, Rubinfeld Analysis II.

[581] Applicants' Reply, CRA Analysis.

[582] JCC Reply, Rogerson Analysis; JCC Aug 4 Ex Parte, Rogerson Analysis II; Cablevision Aug. 20 Ex Parte, Rubinfeld Analysis.

[583] JCC Aug. 4, 2003 Ex Parte

[584] The details of the staff's analysis of foreclosure strategies with respect to local broadcast signals are described in the technical appendix, Appendix D at 1-13. As explained in greater detail in the next section, we conclude that News Corp. has the ability to influence the terms of their affiliates' retransmission consent agreements. To the extent that News Corp is involved in negotiating the terms of retransmission consent for its affiliates, the potential harms relating to foreclosure of broadcast programming extend to a much broader geographic area.

[585] *See* Appendix D, Technical Appendix.

foreclosure in every market in the country.[568] Responding to Applicants' argument that News Corp.'s already maximizes profits on its programming, JCC contends that recent comments made by News Corp. executives belie this analysis, and that it is inconsistent with Applicants' own economic reasoning, including its theory of raising rivals' costs.[569]

197. Commenters further assert that there is no basis for concluding that Applicants' claimed incentives to eliminate double marginalization will offset the competitive harms arising from the transaction.[570] First, they assert that DirecTV is under no obligation to pass cost savings arising from the elimination of double markup on to consumers.[571] Second, they contend that there is no basis to conclude that Applicants' incentives to eliminate double markup—if any—outweigh the incentives to raise rivals costs.[572]

198. Cablevision and its expert Rubinfeld identify several additional alleged flaws in the CRA Analysis. First, they claim that the CRA Analysis, in calculating lost advertising revenue, fails to consider that some customers view Fox signals over-the-air. Second, they assert that even a temporary withholding affects the future growth of an MVPD, because subscribers selecting a new MVPD will consider access to programming in making that decision. Third, they contend that the Applicants fail to acknowledge that News Corp. and DirecTV could easily engage in joint profit maximization, without News Corp.'s having a 100% ownership interest in DirecTV. Finally, they claim that withholding programming from cable competitors may confer significant marketing advantages on DirecTV.[573]

199. Responding to Applicants' argument that temporary foreclosure of broadcast programming cannot be considered a transaction-specific harm because the parties could also accomplish it through contracts, opponents of the transaction contend that it would be difficult for News Corp. and DirecTV to negotiate and monitor compliance with the contracts that would divide the benefits of temporary foreclosure.[574] They further argue that, if the efficiencies of the transaction cannot be gained through arms-length contracting, it is unlikely that the benefits of foreclosure can be achieved through arms-length contracting.[575]

200. Applicants submit a further economic analysis, responding to the analyses of Rogerson and Rubinfeld, which finds that an interest in DirecTV will not make a temporary foreclosure strategy profitable for News Corp. Applicants contend that the Rogerson and Rubinfeld analyses: (1) overestimate the numbers of consumers that would switch to DirecTV due to temporary withholding; (2) overestimate gains to DirecTV based on unrealistic assumptions about the length of time that new

[568] JCC assert that, for this reason, the Commission should not focus on DirecTV's share of the MVPD market, as the Applicants have done in their Reply. JCC Aug. 4 Ex Parte at 4-6.

[569] JCC Aug. 4 Ex Parte at 8 and Rogerson Analysis II at 40-42.

[570] JCC Aug. 4 Ex Parte at 9-10.

[571] JCC Aug. 4 Ex Parte at 9.

[572] *Id* at 9-10 and Rogerson Analysis II at 29-33; Cablevision Aug. 20 Ex Parte, Rubinfeld Analysis at 21-22.

[573] Cablevision Aug. 20 Ex Parte at 2 and Rubinfeld Analysis at 5-9, 11-14, 19-20.

[574] JCC Aug. 4 Ex Parte, Rogerson Analysis II at 22-23; Cablevision Aug. 20 Ex Parte at 24.

[575] JCC Aug 4 Ex Parte, Rogerson Analysis II at 23; Cablevision Aug. 20 Ex Parte at 24.

because, due to Rainbow's small subscriber base, News Corp. would suffer almost no harm from hindering Rainbow DBS' entry into the market.[550]

191. Applicants respond with the CRA Analysis, which finds that permanent withholding of broadcast signals would not be in News Corp.'s economic interest. Comparing the costs (*i.e.*, lost advertising and other revenues) and benefits (*i.e.*, profits from increased subscribership to DirecTV) of withholding the signals of News Corp.'s television broadcast stations from competing MVPDs,[551] the CRA Analysis finds that DirecTV would have to quadruple its subscribership in News Corp.'s O&O markets in order for signal withholding to be a profitable strategy for post-transaction News Corp.[552] Applicants contend that such subscribership increases are implausible.[553]

192. Applicants reject as economically irrational claims that they will be able to raise prices for retransmission consent uniformly following the transaction.[554] According to Applicants, commenters have failed to recognize that such a strategy would: (1) lower expected profits for the O&Os, which are already profit-maximizing in their bargaining for retransmission consent; (2) lower expected profits for DirecTV by increasing its costs for O&O programming; and (3) eliminate certain efficiencies that Applicants expect to result from the transaction, including elimination of double marginalization.[555]

193. Applicants further assert that permanent and temporary foreclosures are not transaction-specific harms because they could effectively be achieved through the use of contracts.[556] As evidence of this, News Corp. points to a retransmission dispute in which broadcast television stations owned by Disney were briefly dropped from Time Warner cable systems in May 2000 in a dispute over retransmission consent. In the time leading up to the removal of the signal, Disney agreed with DirecTV to subsidize customers that switched from Time Warner to DirecTV.[557]

194. JCC and Cablevision respond that Applicants' Reply and the CRA Analysis fail to address the likelihood of the potential harm of temporary foreclosure which they had raised.[558] JCC assert that, while the Applicants have attempted to prove that permanent withholding of Fox programming would be unprofitable, it is temporary and not permanent foreclosure that is the real threat posed by the transaction.[559] They further contend that control of DirecTV effectively reduces the costs

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[550] Cablevision Comments at 20.

[551] Applicants' Reply, Exhibit B, CRA Analysis at 43-46. CRA also considers whether the transaction would enhance News Corp.'s incentive and ability to withhold its broadcast station signals only from small cable operators and finds that signal withholding would still be unprofitable. *Id.* at 47-49.

[552] Applicants' Reply at 41 (citing CRA Analysis at 44, 52).

[553] Applicants' Reply at 42.

[554] Applicants' Reply at 44.

[555] Applicants' Reply at 44.

[556] Applicants' Reply at 24.

[557] Applicants' Sep. 8 Ex Parte at 3; Lexecon Analysis II ¶ 66

[558] JCC Aug. 4 Ex Parte; Cablevision Aug. 20 Ex Parte.

[559] JCC Aug. 4 Ex Parte at 2; *see also* Cablevision Aug 20 Ex Parte at 1, Rubinfeld Analysis at 2.

carriage of Fox O&Os are characterized by "take it or leave it" proposals and threats to deny carriage that will particularly disadvantage DirecTV's smaller competitors in less dense areas of the country once News Corp. acquires control of DirecTV.[531] ACA reiterates that its concerns arise from the unique combination of assets that the transaction brings together, and argues that the ability of a combined News Corp./DirecTV to disadvantage smaller competitors through retransmission consent is "unprecedented and must be addressed within the context of this proceeding."[532]

187. Cablevision disputes Applicants' claim that they lack the incentive and ability to withhold access to their broadcast programming, and contends that similar arguments already have been considered—and rejected—by the Commission.[533] Specifically, Cablevision notes that the Commission has previously held that a vertically integrated programmer has the incentive and ability to favor its affiliated MVPD when that MVPD has the power to reach all potential subscribers, who can switch to that provider to receive the programming if they view it as valuable.[534] Cablevision also notes that although cable operators argued, as Applicants do here, that it would not make economic sense to limit distribution of affiliated programming, the Commission found that argument unpersuasive.[535] Cablevision also points to the Commission's conclusion that where "must-have" programming is involved, denying program access to a competitor is an investment that brings benefit because subscribers will switch providers in order to receive it.[536] Cablevision contends that these conclusions apply with equal force to post-transaction News Corp., which will have the same incentives and abilities to withhold access to its broadcast programming as would a vertically integrated MSO.[537]

188. Most MVPD commenters maintain that the Commission's rule that broadcasters negotiate in good faith is an inadequate safeguard, standing alone, in the context of the proposed transaction.[538] Commenters note that, at the time the good faith provisions were adopted, cross-ownership of a cable system and a television broadcast station in the same market was prohibited, so the Commission was unlikely to have considered the impact of common ownership of broadcast stations and an MVPD on retransmission consent negotiations.[539] JCC assert that the retransmission consent scheme

[531] ACA Comments at 13-15; ACA Oct. 17 Ex Parte.

[532] ACA Oct 17 Ex Parte at 4-5.

[533] Cablevision Comments at 28 (citing *Program Access Order*, 17 FCC Rcd at 12125 ¶ 3); *see also* JCC Aug. 4 Ex Parte at 6-7

[534] Cablevision Comments at 28 (citing *Program Access Order*, 17 FCC Rcd at 12125 ¶ 3).

[535] Cablevision Comments at 28.

[536] Cablevision Comments at 28.

[537] Cablevision Comments at 28-29 Cablevision contends that News Corp.'s ability to withhold broadcast programming is even greater than that of a vertically integrated MSO, because "local broadcast signals win a substantially greater share of the viewing audience and represent "must have" programming far more than any cable programmer could." *Id.* at 29.

[538] EchoStar Petition at 15-16, 19-21; ACA Comments at 11-12, JCC Comments at 31-34; Cablevision Comments at 11, 26.

[539] EchoStar Petition at 14. This prohibition was subsequently vacated by the U.S. Court of Appeals for the D.C. Circuit. *See Fox Television Stations v. FCC*, 280 F.3d 1027 (D C. Cir. 2002); *reh'g granted in part*, 293 F.3d 537 (D.C. Cir 2002).

only upon actions that the Commission has identified as *per se* evidence of bad faith, but also based on any other factors that support such an inference under a totality of circumstances test.[514] It is against this backdrop that we evaluate the parties' claims with respect to the effect of this transaction.

### (ii) Positions of the Parties

182. Applicants assert that the transaction creates no incentive for News Corp. to withhold the broadcast signals of its O&Os from other MVPDs. Applicants further assert that, although retransmission consent negotiations are sometimes difficult, News Corp. has never failed to reach a mutually acceptable agreement with any MVPD.[515] Because national, regional, and local advertisers seek maximum reach, Applicants claim that it is essential for Fox and other broadcast networks to come as close as possible to 100% audience reach.[516] They further claim that because advertising is the sole revenue source in the broadcast network business, audience reach is even more critical for the success of broadcast stations than it is for cable networks, which are partly supported by subscriber fees.[517] They add that audience reach within each DMA also is critical to securing local and regional advertising. According to the Applicants, the need to secure advertising makes it economically irrational to restrict access to O&O signals in the hopes of gaining DirecTV subscribers.[518]

183. Applicants further contend that even if News Corp. sought to withhold access to broadcast signals, the Commission's rules requiring good faith negotiation and prohibiting exclusive retransmission consent agreements would prevent News Corp. from using retransmission consent to undermine DirecTV's MVPD rivals.[519] Applicants assert that withholding broadcast signals also would hurt News Corp. by reducing retransmission consent compensation, including compensation for News Corp.'s cable programming services.[520]

184. Commenters counter that by giving News Corp.'s Fox Network guaranteed access to national distribution via DirecTV, the transaction will increase the incentive and ability of News Corp. to withhold retransmission consent temporarily, to the detriment of competing MVPDs and, ultimately, the public.[521] MVPD commenters contend the transaction fundamentally shifts the balance of power between MVPDs and Fox broadcast stations in retransmission negotiations because Fox will have the

[514] Applicants' Reply at 45; 47 C.F.R. § 76.65(b)

[515] Application at 63.

[516] Application at 64. Applicants note that, because 15 of the 35 O&Os are UHF stations, which receive less over-the-air coverage, distribution of its signals on all MVPD platforms is particularly important. *Id.* at n.105. Applicants assert that, if News Corp lost carriage of Fox network programming on even a small number of systems, it would risk being perceived by advertisers as a second-class outlet compared to ABC, CBS or NBC, and would no longer be able to command comparable advertising rates. Applicants' Reply at 40.

[517] Application at 64.

[518] Application at 64.

[519] Application at 64-65; Applicants' Reply at 44-47.

[520] Applicants' Reply at 41.

[521] NAB Comments at i-ii; EchoStar Petition at 1-2; Cablevision Comments at 11-18; NRTC Petition at 11-17; JCC Comments at 15-33; CFA Reply Comments at 4, 11-12.